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Rural Telephone Coalition

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

COMMENTS OF

of the

RURAL TELEPHONE COALITION

December 20, 1996

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SUMMARY

Section 259 is intended to maintain and foster non-competing LEC arrangements that benefit the public by enabling carriers lacking economies of scope and scale to provide services or access. The legislative history of the 1996 Act shows that Section 259 covers LEC-to-LEC cooperating agreements negotiated before the Act as well as new arrangements.

The RTC agrees with the Commission that the best way for it to implement Section 259 is through general rules and guidelines. Under the cooperative arrangements Congress envisioned, limited rules will achieve the Congressional goal and give carriers flexibility to negotiate and operate under arrangements that serve their particular needs. For example, there is no need for elaborate pricing or dispute resolution rules. The existing declaratory ruling and formal complaint processes are adequate to resolve any disputes. Nor should the Commission impose Title II non-discrimination requirements in the infrastructure sharing environment since Section 259 prohibits it from treating LECs as common carriers for purposes of infrastructure sharing. The RTC also agrees that Section 259 applies to both interstate and intrastate communications.

The Commission can facilitate negotiated agreements and cooperation by interpreting the scope of the items under Section 259(a) in the broadest, most comprehensive manner possible. Resale, interconnection, and unbundled network elements are included within the scope of Section 259(a), so long as such facilities and functions are a part of the public switched network.

The Commission should also interpret Section 259 to permit qualifying carriers to obtain facilities and functions -- including resale, interconnection, and unbundled network elements -- pursuant to Section 251, even where the requesting carrier does not compete with the providing LEC. However, the Commission may not *require* qualifying carriers to obtain these services and element under Section 251 merely because this access will not be used to compete in the providing LEC's service area. Also, infrastructure sharing under Section 259 is not limited to existing facilities.

The Commission should not narrow its definition of a qualifying carrier beyond those criteria stated in Section 259(d). Nothing in the statute suggests that infrastructure sharing be limited to qualifying carriers and their "adjacent" incumbent LECs. The only requirements under the statute are that a carrier must lack economies or scale or scope, offer universal service, and be designated as an eligible carrier under Section 214(e). Incumbent LECs should be required to fulfill Section 259 obligations with respect to any qualifying carrier, regardless of whether the carrier *requested* designation as an ETC under Section 214 or the state designated the carrier *on its own motion*.

With respect to the obligations of incumbent LECs that must provide infrastructure elements, the RTC agrees that joint ownership is a method for an ILEC to meet its sharing obligations and that, in such arrangements, all carriers would be treated as incumbents. The RTC also agrees with the Commission's tentative conclusion that a providing ILEC need not enter into any infrastructure arrangement with a qualifying carrier if such carrier is offering any service subject to sharing in the providing carrier's telephone exchange service area. However, the service area in which the qualifying carrier may not compete with shared infrastructure includes only the area in which the provider is the "incumbent local exchange carrier," not any territory the providing ILEC may serve as a CLEC.

The Commission's notification rules must take into account the need for a potentially qualifying LEC to have notice sufficiently in advance of the providing LEC's infrastructure implementation to identify and request planning and implementation modifications that could add economies of scale and scope that may be available for sharing. The RTC believes that the requirement for providing information about "planned deployment" cannot await the providing ILEC's "make/buy" decision point.

Finally, the Commission should adopt a presumption that "rural telephone companies," as defined in the Act, meet the standards for a qualifying carrier under Section 259(d) subject to rebuttal by the providing LEC. Also, it would not be appropriate to determine the comparative economies of scale or scope on the holding company level when an individual carrier owned by the parent requests infrastructure sharing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-237
	)	
	)	
	)	

COMMENTS
of the
RURAL TELEPHONE COALITION

I. INTRODUCTION

The Rural Telephone Coalition (RTC) hereby files these comments in response to the *Notice of Proposed Rulemaking* released in CC Docket No. 96-237 on November 22, 1996. This proceeding is examining implementation of Section 259 of the Telecommunications Act of 1996.[1]

The RTC is comprised of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). These associations together represent more than 850 local exchange carriers (LECs) serving rural areas

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act, the Act).

throughout the United States.

II. COMMENTS

A. General

Response to Paragraph 6: The Commission begins the substance of the Notice by tentatively concluding that the requirements of Section 259 of the 1996 Act should be interpreted, where possible, as complementary to its implementation of other sections of the Act. The RTC concurs that where possible and appropriate, all sections of the Act should be interpreted in a complementary fashion. However, the FCC, in promulgating its rules, must recognize that Section 259 has equal standing in the law with all other sections and cannot be subordinated to the implementing rules of any other section or provision, most notably Section 251.

Congress included Section 259 in the 1996 Act because it recognized the past, present, and future importance of allowing carriers lacking economies of scale and scope to share resources with incumbent LECs with which they do not compete. To surrender the design of this section to the Commission's rules on interconnection, which are intended for a completely different purpose -- *i.e.* the development of competition -- would flout the intent of Congress.[2] Instead, the Commission should focus on harmonizing its rules on infrastructure sharing with

[2]In the *Local Competition First Report and Order*, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45476, (rel. Aug. 8, 1996), the FCC ruled that arrangements between adjacent incumbent LECs that have historically been used to share responsibility for non-competing services and functions, such as extended area service (EAS) agreements, are subject to the requirements of Section 251 and 252 of the 1996 Act. 47 C.F.R. Sec. 51.303. This rule is being challenged by the RTC and the United States Telephone Association (USTA) in *Iowa Utilities board v. FCC*, No. 96-3321, (8th Cir., Oct. 15, 1996).

the *statutory language* of Section 251 and other sections of the Act where appropriate.

Response to Paragraph 7: The RTC agrees with the Commission that the best way for it to implement Section 259 is through general rules and guidelines. Many of the qualifying carriers under Section 259 will be independent LECs that have been successfully negotiating mutually beneficial sharing arrangements for more than 100 years with virtually no federal government intrusion. These agreements can take many forms and vary by State. The FCC can best implement Section 259 by giving carriers the necessary flexibility to negotiate the arrangements that serve their particular needs.

B. Requirements of Section 259(a)

Response to Paragraphs 9, 10: Section 259(a) establishes the obligation of incumbent local exchange carriers (ILECs) to make available to any requesting qualifying carrier public switched network infrastructure, technology, information, and telecommunications facilities and functions. It is apparent that Congress, when developing this "laundry list" of things that are permissible for sharing, wanted to ensure that qualifying carriers could obtain whatever it is they need to modernize their networks and broaden the services they provide to their customers. As the Commission recognizes, terms such as "telecommunications facilities and functions" are included in Section 259(a) without any qualifying language. Thus, the Commission should interpret the scope of the items under Section 259(a) in the broadest, most comprehensive manner possible. This will provide qualifying carriers with the flexibility they will need to obtain the desired resources and capabilities as technology evolves. It would also be correct to conclude that resale, interconnection, and unbundled network elements are included within the scope of Section 259(a), so long as such facilities and functions are a part of the public switched network.

Response to Paragraphs 11, 13: While a reasonable reading of Section 259(a) provides a comprehensive means for a qualifying carrier to obtain public switched network infrastructure, technology, etc. from an incumbent LEC with which it does not compete, it would be *incorrect* to determine that Section 259 is the *only* means through which this infrastructure can be acquired. In some instances, a qualifying carrier may prefer to interconnect under Section 251, rather than through Section 259, for example, to avoid the limitations on its use under Section 259 or because it does not want to argue about relative economies of scale. Qualifying carriers should be permitted to obtain facilities and functions -- including resale, interconnection, and unbundled network elements -- pursuant to Section 251, even where the requesting carrier does not immediately plan to compete with the providing LEC.[3] By the same token, the Commission may not *require* qualifying carriers to obtain resale, interconnection, and unbundled network elements under Section 251 when such access will not be used to compete in the providing LEC's service area.

As noted *supra,* the Commission astutely recognized that "telecommunications facilities and functions" in Section 259(a) is stated without terms of limitation. Similarly, there is no qualifying language in: (a) Section 259 declaring that it is the exclusive province of infrastructure arrangements; or, (b) Section 251 or 259 establishing that all resale, interconnection, and unbundled network elements must be obtained pursuant to Section 251.

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[3]Of course, arrangements pursuant to Section 251 would not be subject to protection from the imposition of common carrier requirements on the providing incumbent LEC as is provided under Section 259.

Response to Paragraph 14: The FCC appears to lose sight of the intent of Section 259 momentarily when it suggests that a "benefit" to requiring qualifying carriers to acquire interconnection and unbundled elements under Section 251 instead of Section 259, would be to promote competition in local exchange markets. Congress included Section 259 specifically to create and preserve opportunities for qualifying carriers *outside* the competitive framework of the Act. For instance, under Section 259, providing LECs cannot be required to offer the terms of infrastructure sharing arrangements on a common carrier basis and the rates established are not subject to the Section 252 pricing standards for arbitration. Again, there is nothing in the Act that can be interpreted to prevent a qualifying carrier from obtaining the desired infrastructure through Section 259 **or** Section 251. To otherwise shackle qualifying carriers to one section or the other would unnecessarily hamper them and be without justification in the law.

Response to Paragraph 12: The FCC correctly observes that the definition of a qualifying carrier under Section 259(d) will apply to many small LECs. This observation, does not, however, warrant a conclusion that the provisions of Section 259 were intended to apply only to cases involving small LECs. However, "rural telephone companies" should be presumed to meet the standards for a qualifying carrier under Section 259(d), subject to rebuttal by the providing LEC. The Act is clear on the criteria for qualifying carrier designation -- it must lack economies or scale or scope, offer universal service, and be designated as an eligible carrier under Section 214(e). A requesting carrier and the carrier to whom it makes its request are the best judges of their comparative economies of scale and scope. The Commission should not seek to narrow its definition of a qualifying carrier beyond those criteria stated in Section 259(d).

There is also nothing in the statute to suggest that infrastructure sharing be limited to qualifying carriers and their "adjacent" incumbent LECs. In some instances, the adjacent ILEC may not be able to provide a qualifying carrier with the infrastructure that it requests. Qualifying carriers require the flexibility to negotiate arrangements with a LEC other than a neighbor in order to ensure access to resources and capabilities needed to provide full service to their customers. Any legitimate problems that may arise from a request to a "non-adjacent" LEC can be mitigated, if necessary, by the "economically unreasonable" and "contrary to public interest" clauses of Section 259(b)(1).

Response to Paragraph 15: The FCC is right to conclude that Section 259 requires mandatory patent licensing, subject to payment of reasonable royalties, where necessary to gain access to the shared capability or resource by the qualifying carrier's equipment. A providing carrier cannot be permitted to refuse to license a patent as grounds for avoiding its obligations under Section 259. To allow such a loophole for ILECs would defeat the purpose of the statute.

Response to Paragraph 16: Qualifying carriers should be entitled to any proprietary business information needed to provide services through the infrastructure, facilities, technology, etc. that it acquires from a providing LEC. It would be appropriate for the agreement to require them to treat the information as proprietary. This proprietary information will often be necessary to permit a qualifying carrier to "fully benefit from the economies of scope and scale"[4] of the providing LEC. The sharing of information would also "establish conditions that promote cooperation"[5] between the providing LEC and qualifying carrier. Network information made available under Section 259 would be similar to information disclosed under Section 251(c)(5), but may tend to be more comprehensive because of the non-competitive relationship between the carriers.

Joint network planning to some degree will often be required to implement infrastructure sharing arrangements. There also may be databases that are necessary for a qualifying carrier to fully benefit from the sharing arrangement beyond that which an ILEC is required by Section 251(c)(3) to provide competitors as unbundled elements. The Commission must keep in mind when promulgating its rules that the information and databases at issue will be used for a different purpose and under different statutory provisions under Section 259.

Response to Paragraph 17: In keeping with the Commission's proposal to remain unobtrusive in the negotiating process among parties,[6] rules for dispute resolution should also be minimal. If carriers are given the room to negotiate arrangements as they see fit, disputes should not arise often. When they do, carriers can usually resolve disputes on their own accord if given the opportunity and flexibility. Complaints to this Commission or the appropriate state commission should be an option where negotiations fail.

Response to Paragraph 18: The Commission is correct to conclude that Section 259

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[4]1996 Act at Section 259(b)(4).

[5]1996 Act at Section 259(b)(5).

[6]NPRM at para. 6.

applies to both interstate and intrastate communications. However, the FCC cannot preempt the states with regard to the roles they are expressly designated. For instance, the Commission cannot preempt a state's designation of eligible telecommunications carriers (ETCs) under Section 214. In all practicality, it is unlikely that the issue of preemption will arise under Section 259 because of the distinctly separate spheres in which the FCC and states operate under the statute.

Response to Paragraph 19: Incumbent LECs should be required to fulfill Section 259 obligations with respect to any qualifying carrier, regardless of whether the carrier *requested* designation as an ETC under Section 214 or the state designated the carrier *on its own motion*. Under Section 214(e)(2), a state has the option of designating an initial carrier for a service area as an ETC on its own motion without the carrier's request.[7] Only after one service provider has been designated as an ETC in an area do additional carriers have to make a request before a state can designate them as eligible. Some state commissions, in an effort to avoid unnecessary paperwork, may ask that incumbents not file requests and simply deem them eligible on their own motion. If providing LECs were only required to share infrastructure with carriers that requested ETC designation, it is possible that many small and rural LECs would be shut out from provisions in the Act intended, in large part, to benefit them and their customers.

Furthermore, in the statute's definition of a qualifying carrier, no distinction is made as to an eligible carrier having requested such designation. Section 259(d)(2) simply reads:

[7]In most cases, this will be the incumbent LEC.

"...for which such carrier has been designated as an eligible telecommunications carrier under Section 214(e)." Obviously, it would not be logical for carriers to be deemed qualifying carriers if incumbent LECs were not required to enter into Section 259 arrangements with them. Accordingly, the Commission should require incumbent LECs to infrastructure share with any qualifying carrier as defined in Section 259(d).

C. Terms and Conditions Required By Section 259(b)

Response to Paragraph 20: The NPRM requests comment on whether, or under what circumstances it would be "economically unreasonable"-- and therefore not required by Section 259 -- to require an incumbent LEC to make investments it did not otherwise intend to make. There is no simple answer to this question because the answer depends upon the circumstances of a particular case. The Act does not restrict requests for infrastructure sharing to existing facilities. Rather, it requires the Commission to adopt regulations which will require incumbent LECs to make "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier, except where it would be economically unreasonable or contrary to the public interest.[8]

In some circumstances it would be economically unreasonable to require a carrier to develop and deploy a technology it would not have on its own initiative. In other cases the additional investment will not be an operational burden on the ILEC and the requesting carrier would pay all of the costs if the incumbent did not also use the investment. On the other hand,

[8] 1996 Act at Section 259(a), (b)(1).

where satisfaction of the request involves increasing the capacity of an existing facility, making the additional investment is well within the contemplation of the statute and will generally be beneficial to both parties. This is because higher capacity facilities usually have a lower unit cost, *i.e.*, they exhibit economies of scale.

It would be unreasonable to require an ILEC to incur material expenses which it could not recover. However, an incumbent's inability to earn a "fair" return on its investment with a requesting carrier because of competitive market conditions does not thereby excuse the ILEC from its Section 259 obligations. It is possible that an arrangement, once adopted, could become economically unreasonable over time. In such situations, the arrangement should be renegotiated, or failing that, a reasonable period allowed for the requesting carrier to seek other sources of supply to serve its customers.

Response to Paragraph 21: The RTC agrees that joint ownership is a method for an ILEC to meet its sharing obligations and that, in such arrangements, all carriers would be treated as incumbents. Parts 32 and 36 of the Commission's rules do not require revision, since each carrier records and allocates investment, expense, and revenue according to its share determined by the agreement. In fact, such agreements have long been in use in the industry, such as joint ownership of pole lines with electric utilities. The only new requirement is that the agreements be filed with the state commissions. Joint ownership should extend to all of the items listed in Section 259(a), since there is no reason to exclude any of them.

Response to Paragraph 22: The RTC believes that a Title II non-discrimination requirement cannot be imposed in the infrastructure sharing environment because of the specific preclusion of common carrier obligations. The terms made available to each requesting carrier must be just and reasonable and permit it to fully benefit from the economies of scale and scope. The incumbent cannot be required to balance competition between two or more qualifying carriers. The purpose of this section is to encourage, not discourage, the sharing of infrastructure. It should not impose burdens on the incumbent, but should facilitate mutual benefits in a way that does not disadvantage the incumbent vis-a-vis its competitors.

Response to Paragraph 23: The statutory requirement that infrastructure sharing arrangements allow the requesting carrier to fully benefit from the economies of scale and scope is not limited to pricing issues. Availability, timeliness, functionality, suitability, and other operational aspects are intended as benefits to be expected from infrastructure sharing. However, the RTC does not believe detailed rules are required because the parties should be left to make arrangements in the first place and the possible circumstances are not readily susceptible to projection. Moreover, the Commission should not institute pricing rules when there is no indication that they are needed and the appropriate price will depend on the facts and circumstances of the negotiated arrangement.

Response to Paragraphs 24, 25: The RTC urges the Commission to resist the urge to regulate in the absence of a demonstrated need. All that is needed is incorporation in the Code of Federal Regulations of a recitation of the basic requirements of Section 259 in order that the obligations of incumbents and the prohibition on federal and state common carrier regulation are set forth. The existing declaratory ruling and formal complaint processes are adequate to resolve any disputes.

Response to Paragraph 26: The RTC agrees with the Commission's tentative conclusion that a providing ILEC need not enter into any infrastructure arrangement with a qualifying carrier if such carrier is offering any service subject to sharing in the providing carrier's telephone exchange service area. However, the service area in which the qualifying carrier may not compete with shared infrastructure includes only the area in which the provider is the "incumbent local exchange carrier," not any territory the providing ILEC may serve as a CLEC. The RTC also agrees that sharing would not be mandatory for access services the qualifying LEC provides to another carrier for use in competing with the providing ILEC in its service area. Such services or access would be available to the qualifying carrier under Section 251.

Response to Paragraph 27: The RTC agrees that "an incumbent may terminate an infrastructure sharing arrangement in the event that it discovers that the qualifying carrier is offering and providing service or access in the providing incumbent LEC's service area." In that case, the incumbent should have the burden of proving that the qualifying carrier is violating the condition of non-competition under Section 259(b)(6). A complaint proceeding before the Commission under Section 208 would be the appropriate forum for adjudication. Because of the potential harm to customers from termination, at least sixty days' notice of violation should be provided to the qualifying LEC and the Commission. The qualifying carrier should have an opportunity to discontinue any conduct inconsistent with Section 259, explain why its conduct is not barred by the restriction on competitive use of shared infrastructure, show that a third party beyond its control is responsible for the use, or make alternative arrangements to supply the end users.

In addition, the providing incumbent should not terminate the sharing arrangement without providing the qualifying carrier an opportunity to renegotiate the arrangement pursuant to Section 251's requirements governing how the incumbent must interconnect with its competitors. If the shared infrastructure is not subject to Section 251 interconnection, the providing ILEC should terminate only if it cannot itself provide the service or access the qualifying LEC was providing to that qualifying LEC's customer. This requirement would be analogous with the Act's requirement in Section 214(e)(4) that a carrier seeking to withdraw as a support-eligible ETC must wait to terminate its status until provision has been made for its customers to continue receiving service by another eligible carrier.

Response to Paragraph 28: The RTC disagrees with the Commission's contention that Section 259 must only apply to agreements reached "pursuant to Section 259," because Sections 251 and 252 apply to require filing and state approval of all previously negotiated agreements. The RTC believes the Act distinguishes arrangements between competitors and customers, and co-carrier agreements between non-competing ILECs. Thus, the FCC has it backwards. Section 252(a), upon which the Commission rests its argument for applying the interconnection provisions of Sections 251 and 252 to existing agreements between non-competing LECs, speaks of "any interconnection agreement negotiated before the date of enactment of the ... [Act]," to be sure. However, the same paragraph states further that it applies to "a request for interconnection, services, or network elements pursuant to Section 251...." The interconnection requirements to be negotiated pursuant to Section 251 were not in effect before the Act was adopted. Section 251(f)(1) of the new law exempts rural LECs in the first instance from the new incumbent LEC requirements, including the duty to negotiate interconnection arrangements pursuant to Section 252, absent a bona fide request and state approval under standards created in the new law. Section 251(f)(2) further allows rural LECs to justify requests to the state for suspensions and modifications of most of the remaining new interconnection requirements. Review of agreements negotiated by rural LECs before the enactment of Sections 251 and 252 will essentially write out the requirement for a bona fide request before Section 252 comes into play, as well as the exemption created by enactment and in force until the statutory prerequisites for termination are met.

In contrast, Section 259(b)(7) makes it clear that it applies broadly to "any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched infrastructure and functions under this section." The progressive tense, "is making available," is consistent with the Section 259 requirements taking effect *in medias res* for arrangements involving . . . "infrastructure and functions." Thus, one purpose of infrastructure sharing -- unlike the novel interconnection provisions -- is to maintain in place agreements for sharing that were already in existence prior to enactment.

The legislative history confirms this intent. Then-Senator Al Gore, in introducing his bill, S. 2810, a forerunner of the infrastructure sharing provision enacted as Section 259, left no doubt that a central goal of infrastructure sharing was to "ensure a continuation of the shared relationship among local exchange carriers" in order to avoid the "alternatives" he deemed "unacceptable" -- "delay[ing] evolution of the public switched network or drop[ping] those [rural] companies and customers off the network."[9] A provision intent on maintaining

[9]Congressional Record, Senate, June 4, 1992, p. S7593-4.

non-competing LEC arrangements cannot be rationally interpreted to be subservient to the new interconnection scheme in Sections 251 and 252 on the grounds that agreements negotiated *before* enactment and involving *non-competing* LECs cannot have been "reached pursuant to Section 259." Section 259(b)(7) does not even use the language of limitation "pursuant to" for infrastructure arrangements, since it deals with arrangements in progress that fall "under this section." In contrast, all signals point to the intent of Congress *not* to subject rural LECs automatically to the interconnection negotiations and approval process, let alone to do so retroactively.

Accordingly, preexisting agreements must be examined under Section 259 *first,* and preserved pursuant to the plain meaning and clear intent of that section if they satisfy the requirements for infrastructure arrangements. However, the RTC agrees that all arrangements for infrastructure and functions that fit "under this section [§259]" and that qualify as infrastructure sharing arrangements, whether formed before or after enactment of the 1996 Act, are subject to the filing requirement. Such agreements must be filed with the Commission or the state for public inspection, depending whether the arrangement relates to interstate or intrastate infrastructure.

D. Requirements of Section 259(c)

Response to Paragraph 29: The Commission's tentative decision that Section 259(c) requires notice to qualified carriers of changes that might affect their ability to benefit fully from Section 259 agreements is generally reasonable. However, it must take into account the need for a potentially qualifying LEC to have notice sufficiently in advance of the providing LEC's infrastructure implementation to identify and request planning and implementation modifications that could add economies of scale and scope that may be available for sharing. The benefits of shared or joint provision should not be limited to an after-the-fact chance to share what the providing LEC has already decided to do for its own benefit.[10]

Response to Paragraph 30: While the RTC agrees that the Commission should not unnecessarily duplicate administrative burdens and that harmonizing statutory requirements is a worthy goal, it would not be appropriate to reduce Sections 251, 259, 273, and certain Commission rules into a single, uniform network disclosure requirement. Section 259 was adopted for the non-competing carrier situation, while the other cited provisions apply in different circumstances and seek to advance competition in particular services. The Commission should give weight to the way Congress wrote the legislation and assume that the drafters had a valid reason for imposing different network disclosure requirements in the different statutory contexts. Of course, to the extent the Commission's rules and regulations deal with disclosure, they must be tailored to fit the statute; a desire for uniformity cannot furnish a valid excuse to ignore or modify the enacted requirements.

Response to Paragraph 31: The RTC agrees that "infrastructure sharing agreement" is a generic term that covers all sharing under Section 259. It is also reasonable to interpret the "timely information" requirement as applying to incumbent LECs that are providers or potential providers. Only with such information can the qualifying carrier know when, whether, or what sharing to request.

Response to Paragraph 32: The RTC believes that the requirement for providing

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[10]See Section 259(c) and response to Paragraph 31, *infra*.

information about "planned deployment" cannot await the providing ILEC's "make/buy" decision point. The information should be available to qualifying LECs when the providing incumbent's plans are firm, but still flexible enough that the ILEC could modify the plan if accommodating a request for infrastructure would lead to a more efficient result by including the qualifying carrier in the project.

Response to Paragraph 33: The RTC believes that Section 259(a) and (c) are intended to provide an expansive definition of the infrastructure that must be shared and to require the provision of whatever information is necessary to achieve the broadly defined sharing. The definitions of the terms "telecommunications services" and "telecommunications equipment" in Section 3 of the Communications Act, as amended, comprehend the entire list in Section 259(a) of what is subject to sharing. Offering such services and using equipment, including software, to provide such services describes an ILEC's public switched network operations in their entirety.

The duty created by Section 251(c) is not equivalent to the infrastructure information requirements. Section 251(c) relates only to new information that the interconnecting party needs in order to use and to interconnect its traffic with the providing ILEC's facilities and networks. In contrast, information required for infrastructure sharing purposes extends to how the providing ILEC uses and plans to use its *own* facilities and to provide its *own* services. The qualifying carrier may then request inclusion in those plans on non-common carrier -- co-provision -- terms, regardless of whether the use would have complied with Section 251, if that section had instead been applicable.

Response to Paragraph 34: The RTC believes that providing ILECs should be required to provide all of the information the Commission discusses in Paragraph 34, except that there needs to be a sufficient opportunity for the qualifying carrier to seek inclusion in the plans. Thus, the information requirement for providing ILECs under Section 259 is not just a matter of notifying a qualifying LEC. The notice must also serve as an opportunity for the qualifying LEC to become a part of the plan. This could, for example, necessitate a coordinated deployment schedule, rather than a schedule dictated by the providing ILEC. In other words, the notion that information provided to a qualifying carrier is provided solely to let that carrier "adjust" to the providing ILEC's plans mistakes the cooperative nature of infrastructure as Congress enacted it.[11]

Response to Paragraph 35:[12] The meaning of "timely" information again turns on the cooperative, non-adversarial dealing that Congress plainly had in mind in requiring the Commission's rules to "promote cooperation" and excluding sharing arrangements between competitors in Section 259(b)(5) and (6). The Commission is correct that Section 259 does not require public availability of the information made available to qualifying carriers. This difference from Section 251(c)(5) is consistent with the different regulatory treatment Congress specified for the arrangements under the two sections. Section 251 contemplates a common carrier relationship between the agreeing carriers; but regulators are prohibited from treating infrastructure sharing arrangements as subject to common carrier requirements by Section 259(b)(3). Given the emphasis on "cooperation" in infrastructure sharing, as opposed to the

[11]See, e.g., 1996 Act at Section 259(b)(5).

[12]See, responses to Paragraphs 31-34, *supra*.

pro-competitive purpose of Section 251, the Commission should not require formal written communications about a planned deployment unless a dispute has arisen as to the obligation to share, or provide information or another issue governing what relationship is required between the parties.

Response to Paragraph 36: The Commission should generally require infrastructure sharing arrangements to include non-disclosure agreements with regard to competitively-sensitive, proprietary, and trade secret information. Routinely including such safeguards will foster the cooperation and voluntary provision of planning information that the infrastructure sharing concept envisions.

Response to Paragraph 37: The Commission should adopt a presumption that a carrier meeting the definition in Section 3(37) of the Act, as amended, for a "rural telephone company" (rural LEC) "lacks economies of scale or scope" in its infrastructure sharing regulations. An ILEC asked to share infrastructure should be allowed to rebut that presumption, using the definitions of economies of scale and scope suggested in the NPRM, since the information to make the comparison will be primarily in its control. The determination must be based on the particular request and the comparative attributes of the carriers involved. There is nothing in the statute to suggest Congress meant the provision only for carriers below a specified size. Size alone does not control whether the requested co-provision will increase the economies of scale or scope for the requesting carrier. However, the legislative history indicates that Congress expected the requests to come primarily from small and rural LECs.

It would not be appropriate to determine the comparative economies of scale or scope on the holding company level when an individual carrier owned by the parent requests infrastructure sharing. Of course, there may be circumstances where affiliated carriers could share infrastructure between or among themselves to increase their economies of scale or scope. However, an individual affiliated carrier could nevertheless determine that its economies of scale or scope would be greater if it shared with an unaffiliated ILEC. The large ILECs have economies from their dense urban subscriber base and traffic volume that even a large group of commonly-owned rural LECs cannot match. That is why the presumption that a Section 3(37) rural LEC lacks economies of scale or scope, unless challenged and rebutted by the ILEC requested to share, is a reasonable approach to satisfying the need to which Section 259 is directed. Presumably, a rural LEC will not ask for infrastructure sharing -- which involves diminished control over its business -- unless sole provision or a sharing arrangement with its affiliates will not achieve economies of scale or scope comparable to the requested arrangement. By the same token, the requested provider will presumably challenge the requesting LEC as not lacking economies of scale or scope or the request as "economically unreasonable" if the request does not increase the economies of scale or scope via co-provision. The resolution of a specific dispute will involve questions of fact.

Moreover, the comparison will depend on the economies achievable with the precise infrastructure sharing between the particular LECs. Thus, a LEC could lack "economies of scale or scope" for some, but not other "public switched infrastructure, technology, information, and telecommunications facilities and functions" subject to sharing by a qualifying carrier. The same LEC could, conceivably, be "qualified" to request infrastructure sharing from one carrier and be required to serve as the providing ILEC in response to a request for sharing by another qualifying carrier. The relative cost to the requester for co-provision and self-provision would be relevant to whether it was "qualified" with regard to a given request.

Response to Paragraph 38: The RTC agrees that there is no need for this Commission to construe the second requirement for becoming a qualifying carrier for infrastructure sharing purposes. Section 214(e) of the Act is a new provision which leaves the determination of ETC status to the states. The Joint Board has properley recommended that the Commission merely reflect the statutory provision in its rules. As the NPRM notes, the Commission must act on the Joint Board's universal service recommendations by May 8, 1997.

III. THE COMMISSION IS REQUIRED TO PERFORM A REGULATORY FLEXIBILITY ACT ANALYSIS AND CONSIDER THE IMPACT OF ITS RULES ON SMALL INCUMBENT LECS

In its Initial Regulatory Flexibility Analysis (IRFA), the Commission includes a discussion of the number of small incumbent LECs affected by the proposed rule but states that it shall continue to "exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this IRFA."[13] The Commission's count of small incumbent LECs is a meaningless exercise in view of its exclusion of small incumbent LECs from the definition of the class of entities protected by the Regulatory Flexibility Act. The Commission's failure doggedly relies on a prior and erroneous conclusion that all incumbent LECs, regardless of size, are "dominant in their field of operation," and consequently, not "small entities" under the RFA. This conclusion ignores the RFA and Small

[13] NPRM at para. 45.